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No. 06-8120

IN THE

Supreme Court of the United States

BRUCE EDWARD BRENDLIN

Petitioner,

v.

THE STATE OF CALIFORNIA,

Respondent.

On Writ of Certiorari to the Supreme Court of California

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether a passenger in a vehicle subject to a traffic stop is thereby "detained" for purposes of the Fourth Amendment, thus allowing the passenger to contest the legality of the traffic stop.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
STATEMENT OF THE CASE	1
A. Factual Background	2
B. California Supreme Court Decision	5
SUMMARY OF THE ARGUMENT	7
ARGUMENT	8
I. THE UNREASONABLE STOP CONSTRAINED PETITIONER'S LIBERTY AND PRIVACY INTERESTS AND HE WAS THEREBY SEIZED FOR FOURTH AMENDMENT PURPOSES.	8
A. A Passenger's Fourth Amendment Rights Are Well Established	10
B. Passengers Are Seized Within The Meaning Of The Fourth Amendment When Authorities Stop The Car	11
C. The Vast Majority Of The Courts To Have Considered These Questions Have Found That A Traffic Stop Constitutes A Seizure Of All Occupants Of The Seized Vehicle	14
II. THE CASE LAW FROM THIS COURT RELIED UPON BY THE CALIFORNIA SUPREME COURT IS IN APPOSITE	21
III. A PASSENGER'S DETENTION LOGICALLY ENDS WHEN THE AUTHORITY RESPONSIBLE FOR THE STOP GIVES PERMISSION OR WHEN THE STOP ITSELF CONCLUDES	24

TABLE OF CONTENTS – continued

Page

IV. THE UNREASONABLENESS OF THE STOP HERE WARRANTS SUPPRESSION OF THE EVIDENCE AGAINST PETITIONER 26

CONCLUSION 31

TABLE OF AUTHORITIES

CASES Page

Arizona v. *Evans*, 514 U.S. 1 (1995) 27
Berkemer v. *McCarty*, 468 U.S. 420 (1984) 11, 18
Brower v. *County of Inyo*, 489 U.S. 593 (1989) ...*passim*
Brown v. *Texas*, 443 U.S. 47 (1979) 9
California v. *Hodari D.*, 499 U.S. 621 (1991) 19, 21
Corngold v. *United States*, 367 F.2d 1 (9th Cir. 1966) 20
Delaware v. *Prouse*, 440 U.S. 648 (1979) 10, 12, 13, 21
Florida v. *Bostick*, 501 U.S. 429 (1991) 21, 22, 23
Florida v. *Royer*, 460 U.S. 491 (1983) 22
Howard v. *State*, 888 S.W.2d 166 (Tex. Crim. App. 1994) 15
Hudson v. *Michigan*, 126 S. Ct. 2159 (2006) 28, 29
Illinois v. *Krull*, 480 U.S. 340 (1987) 26
Jarvis v. *State*, 600 A.2d 38 (Del. Super Ct.), *aff'd sub nom. Mitchell* v. *State*, 604 A.2d 418 (Del. 1991) 16
Mapp v. *Ohio*, 367 U.S. 643 (1961) 27
Maryland v. *Pringle*, 540 U.S. 366 (2003) 25, 26
Maryland v. *Wilson*, 519 U.S. 408 (1997) .....*passim*
McKnight v. *State*, 612 N.E.2d 586 (Ind. Ct. App. 1993) 15
Michigan v. *Summers*, 452 U.S. 692 (1981) 12
Ott v. *State*, 600 A.2d 111 (Md. 1992) 15
Pennsylvania v. *Williams*, 434 U.S. 106 (1997) 10, 12
Pa. Bd. of Prob. & Parole v. *Scott*, 524 U.S. 357 (1998) 27, 31
People v. *Brendlin*, 8 Cal. Rptr. 3d 882 (Cal. Ct. App. 2004), *rev'd*, 136 P.3d 845 (Cal. 2006) 5
People v. *Brendlin*, 136 P.3d 845 (Cal. 2006) .....*passim*
People v. *Bunch*, 764 N.E.2d 1189 (Ill. App. Ct. 2002) 14

TABLE OF AUTHORITIES – continued

Page

People v. *Jackson*, 39 P.3d 1174 (Colo. 2002) 16, 17
People v. *Kunath*, 425 N.E.2d 486 (Ill. App. Ct. 1981) 15
People v. *Lagrone*, 464 N.E.2d 712 (Ill. App. Ct. 1984) 15
Rakas v. *Illinois*, 439 U.S. 128 (1978) 17
Skinner v. *Ry. Labor Executives' Ass'n*, 489 U.S. 602 (1989) 20
State v. *Bowers*, 976 S.W.2d 379 (Ark. 1998) 15
State v. *Carter*, 630 N.E.2d 355 (Ohio 1994) 15
State v. *Creech*, 806 P.2d 1080 (N.M. Ct. App. 1991) 15
State v. *DeMasi*, 419 A.2d 285 (R.I. 1980), *vacated on other grounds*, 452 U.S. 934 (1981) 15
State v. *Eis*, 348 N.W.2d 224 (Iowa 1984) 15
State v. *Epperson*, 703 P.2d 761 (Kan. 1985) 15
State v. *Gomez*, 6 P.3d 765 (Ariz. Ct. App. 2000) .. 15
State v. *Harms*, 449 N.W.2d 1 (Neb. 1989) 15
State v. *Harris*, 557 N.W.2d 245 (Wis. 1996) 15
State v. *Haworth*, 679 P.2d 1123 (Idaho 1984) 15
State v. *Higgins*, 884 P.2d 1242 (Utah 1994) 15
State v. *Krebs*, 504 N.W.2d 580 (S.D. 1993) 15
State v. *Mendez*, 970 P.2d 722 (Wash. 1999) 16, 17
State v. *Stott*, 503 N.W.2d 822 (Neb. 1993), *overruled on other grounds*, *State* v. *Johnson*, 589 N.W.2d 108 (Neb. 1999) 15
State v. *Wilson*, 867 P.2d 1175 (N.M. 1994) 15
Terry v. *Ohio*, 392 U.S. 1 (1968) 19, 22, 27
United States v. *Ameling*, 328 F.3d 443 (8th Cir. 2003) 14
United States v. *Brignoni-Ponce*, 422 U.S. 873 (1975) 9

TABLE OF AUTHORITIES – continued

Page

United States v. *Brown*, 102 F.3d 1390 (5th Cir. 1996), *overruled on other grounds*, 161 F.3d 256 (5th Cir. 1998) 14
United States v. *Calandra*, 414 U.S. 338 (1974) 26
United States v. *Drayton*, 536 U.S. 194 (2002) 22, 24
United States v. *Durant*, 730 F.2d 1180 (8th Cir. 1984) 14
United States v. *Erwin*, 875 F.2d 268 (10th Cir. 1989) 14
United States v. *Eylicio-Montoya*, 70 F.3d 1158 (10th Cir. 1995) 14
United States v. *Gama-Bastidas*, 142 F.3d 1233 (10th Cir. 1998) 14
United States v. *Grant*, 349 F.3d 192 (5th Cir. 2003) 14
United States v. *Hensley*, 469 U.S. 221 (1985) 11, 18
United States v. *Hill*, 855 F.2d 664 (10th Cir. 1988) 14
United States v. *Jacobsen*, 466 U.S. 109, 113 (1984) 18, 19
United States v. *Kimball*, 25 F.3d 1 (1st Cir. 1994) 14
United States v. *Leon*, 468 U.S. 897 (1984) 27, 28
United States v. *Mendenhall*, 446 U.S. 544 (1980) 9, 10, 22
United States v. *Mosley*, 454 F.3d 249 (3d Cir. 2006) 14
United States v. *Powell*, 929 F.2d 1190 (7th Cir. 1991) 14
United States v. *Roberson*, 6 F.3d 1088 (5th Cir. 1993) 14
United States v. *Rusher*, 966 F.2d 868 (4th Cir. 1992) 14
United States v. *Sowers*, 136 F.3d 24 (1st Cir. 1998) 14

TABLE OF AUTHORITIES – continued

Page

United States v. *Souza*, 223 F.3d 1197 (10th Cir. 2000) 20
United States v. *Twilley*, 222 F.3d 1092 (9th Cir. 2000) 14
United States v. *Williams*, 589 F.2d 210 (5th Cir. 1979) 14
Weeks v. *United States*, 232 U.S. 383 (1914), *overruled on other grounds by Mapp* v. *Ohio*, 367 U.S. 643 (1961) 27
Whren v. *United States*, 517 U.S. 806 (1996) 11, 12, 17
Wyoming v. *Houghton*, 526 U.S. 295 (1999) 25

CONSTITUTION AND STATUTES

U.S. Const. amend. IV 18
Cal. Health & Safety Code § 11377(a) 4
§ 11379(a) 4
§ 11379.6 4
Cal. Veh. Code § 4853 2

SCHOLARLY AUTHORITIES

Erica Flores, *"People, Not Places": The Fiction of Consent, the Force of the Public Interest, and the Fallacy of Objectivity in Police Encounters with Passengers During Traffic Stops*, 7 U. Pa. J. Const. L. 1071 (2005) 16
W.R. LaFave, *Search and Seizure* (4th ed. 2004) 15

OTHER AUTHORITIES

1 Crim. Prac. Manual (Feb. 2007) 16
Paul Coltoff et al., 79 C.J.S. *Searches* (Feb. 2007) 16
William E. Ringel, *Searches and Seizures, Arrests and Confessions* (Mar. 2007) 15

STATEMENT OF THE CASE

The simple question in this case is whether, for purposes of the Fourth Amendment, a police officer who seizes a car by means of a traffic stop also seizes any passengers who are also traveling in that car. The Court's precedents both indicate – and, indeed, analytically require – an answer in the affirmative. The vast weight of authority in both the federal and state courts to have considered the question directly have so held. This weight of authority stems from Fourth Amendment principles concerning the constraint of acknowledged liberty interests, the highly common-sense view that a passenger is unavoidably seized along with the car, and an implicit acknowledgement that reasonable passengers would not feel free to simply get out and walk away once an officer has pulled the car over.

The Court's precedents most directly on point concern the ability of police officers to control both drivers and passengers in the course of a traffic stop. These precedents are squarely based on concerns for officer safety and hold, over strong dissents, that a passenger's liberty interests are constrained in a traffic stop. When an officer is able to exert sufficient authority to order a passenger out of a car in the course of a traffic stop (or, by extension, to order someone who has gotten out of the car to get back in), it makes absolutely no sense to say for Fourth Amendment purposes that a passenger is not seized and therefore entirely free to either stay or leave. As a general rule, such persons are detained for the balance of the time necessary to resolve the reason for the stop or until they are excused by the officer.[1]

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[1] There may also be circumstances in which a reasonable person would not feel free to leave even when that individual is informed by the officer that he or she is free to leave (*e.g.*, unsafe neighborhood, difficult roadway conditions). *See Amici* Brief in Support of Petitioner, the National Association of Criminal Defense Lawyers and the National Association of Federal Defenders at 4-5, 14 (NACDL & NAFD Br.); *Amici* Brief in Support of Petitioner, the American Civil Liberties Union at 6

In this case the stop was made without any reasonable basis for suspicion. A Sheriff's Deputy stopped the vehicle in which Petitioner Bruce A. Brendlin was riding for an expired license plate, despite the acknowledged display of a valid temporary operating permit and the fact that the dispatcher had informed the Deputy, prior to the stop, that although the registration had expired, an application for renewal had been filed. RT 43 (JA 60). From this constitutionally invalid seizure inescapably followed Petitioner's identification by the Deputy, his arrest on the outstanding warrant (for failure to report to his parole supervisor), and his charge and conviction for methamphetamine production. The fruit of this paradigmatic poisonous tree warrants suppression and the California Supreme Court's decision should be vacated.

A. Factual Background

Yuba City, a part of Sutter County, is located about 40 miles north of Sacramento, California. On November 27, 2001, a Sutter County Deputy Sheriff and his cadet partner fell in behind a car in which Petitioner was riding in the front passenger seat. Earlier in the evening, the Deputy had seen the unoccupied car parked at a convenience store and noticed what appeared to be an expired registration sticker (reading "9" for September) on the license plate. However, he also spotted a red temporary operating permit from the California Department of Motor Vehicles prominently displayed in the rear window. RT 12-13 (JA 34-35). The temporary permit had the number eleven on it, indicating that it was valid through the month of November. The Deputy contacted his dispatcher who confirmed the expired registration, but also informed that an application was in process for renewal of the registration. RT 12-14, 42-44 (JA 34-36, 60-61). Under California law, this permits operation of the vehicle. See Cal. Veh. Code § 4853. The Deputy later testified that he saw nothing unusual or suspicious about the temporary permit and that its location was proper and prominent. RT 29-30 (JA 49).

Nonetheless, when he and his partner spotted the car again several hours later, the Deputy activated his lights and pulled the car over. As the Deputy later explained, he needed to verify that the temporary operating permit had in fact been issued for that automobile, despite the Dispatcher's earlier verification that a renewal application was in process for the license for that car. RT 42-44 (JA 60-61). After he stopped the car, the Deputy switched on his spotlight and approached the driver's side of the vehicle. The Deputy asked the driver to produce her license, which she did. At that point the Deputy recognized Petitioner as "one of the Brendlin brothers." RT 48 (JA 65). He asked petitioner to identify himself and Petitioner did so.[2] The Deputy suspected that either Petitioner or his brother was a parolee at large, so he contacted dispatch and eventually received word that Petitioner was wanted for a parole violation.[3] The Deputy then ordered Petitioner out of the car at gunpoint and placed him under arrest. A search incident to arrest turned up an orange syringe cap in Petitioner's shirt pocket and items related to methamphetamine manufacturing in the car. RT 12-19, 26-38, 43 (JA 34-40, 46-56).

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[2] In its opinion, the California State Supreme Court asserts that "[i]n response to the deputy's inquiry, the defendant falsely identified himself as Bruce Brown." *People* v. *Brendlin*, 136 P.3d 845, 847 (Cal. 2006) (JA 115). This assertion plainly has its source in a typographical error in the suppression hearing transcript. RT 16 (JA 37). At the earlier preliminary hearing (to determine whether Petitioner and the driver should be held over on the charges), just 10 days after the arrest, the Deputy testified that Petitioner properly identified himself. Preliminary Hearing at 6 (Cal. Super. Ct. Dec. 7, 2001). On cross-examination at the suppression hearing, the Deputy again recited that Petitioner had properly identified himself. RT 38 (JA 56). Further, there is absolutely no mention in either transcript by the prosecutor of a purported misidentification.

[3] Petitioner's parole had been suspended and a warrant issued because he had failed to report to his parole supervisor as required. RT 56-58 (JA 72-74).

On December 21, 2001, the district attorney of Sutter County, California filed an information in Superior Court charging Petitioner and the driver[4] with manufacturing methamphetamine (Cal. Health & Safety Code § 11379.6)[5], transporting methamphetamine (*id.* § 11379(a)), and possessing methamphetamine (*id.* § 11377(a)) on November 27, 2001. Information at 1 (Cal. Super. Ct. Dec. 21, 2001).

Petitioner moved to suppress the evidence obtained in the search of his person and the search of the car as the fruits of a unconstitutional seizure because the Deputy had no reasonable suspicion to justify the initial traffic stop. At a hearing on February 8, 2002, the Superior Court denied that motion, finding that the traffic stop was not unreasonable on the basis of the Deputy's explanation that he needed to check the temporary permit despite its conceded visibility and the fact that his dispatcher had confirmed that the renewal was in process. RT 42-43 (JA 60-61). Further, the Court found that Petitioner was not detained by virtue of the traffic stop because he was free to leave once the car stopped moving. On this basis, the Court further held that Mr. Brendlin lacked "standing" to bring a motion to suppress the items found in the car. RT 70 (JA 85).

Petitioner pled guilty on February 11, 2002 to a violation of California Health and Safety Code section 11379.6, subdivision (a) (manufacturing methamphetamine), and admitted in an amended allegation that he had served a prior prison term within the meaning of California Penal Code section 667.5, subdivision (b). The District Attorney moved to dismiss the remaining counts and allegations, and the parties agreed that Petitioner would serve a term of four years in state prison, concurrent to any additional sentence later

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[4] The driver was not a party to the appeal.

[5] All references to the Health and Safety Code, the Vehicle Code, or the Penal Code are to the code of the State of California unless otherwise specified.

imposed for Petitioner's failure to submit to parole supervision. Mr. Brendlin was sentenced in accordance with the plea agreement that same day. Clerk's Docket and Minutes (Cal. Super. Ct. Nov. 29, 2001) (JA 1).

Petitioner filed timely notice of appeal under Penal Code section 1538.5, subdivision (m). On January 27, 2004, the Court of Appeal of the State of California, Third Appellate District, issued an opinion reversing the denial of Petitioner's motion to suppress. *People* v. *Brendlin*, 8 Cal. Rptr. 3d 882 (Cal. Ct. App. 2004) (JA 102-111). The Third Appellate District held that Mr. Brendlin was entitled to challenge the legality of the traffic stop, that the stop was undertaken without reasonable suspicion, and that the evidence seized from Mr. Brendlin's person and from the car should have been suppressed as fruits of the illegal traffic stop. *Id.* (JA 102-111). The state sought review.

B. California Supreme Court Decision

A narrow majority of the California Supreme Court reversed. *People* v. *Brendlin*, 136 P.3d 845 (Cal. 2006) (JA 114-140). During the proceedings, the Attorney General's Office conceded that there was no reasonable suspicion for the traffic stop. *Id.* at 848 (JA 118-119). Nonetheless, the Court held that Petitioner had never been "seized" for purposes of the Fourth Amendment. The opinion offers its own – and novel – three-part test to determine whether or not a "seizure" has taken place:

> A seizure occurs when [1] the police, by the application of physical force or show of authority, seek to restrain the person's liberty; [2] the police conduct communicated to a reasonable innocent person that the person was not free to decline the officer's request or otherwise terminate the encounter; and [3] the person actually submitted to that authority for reasons not "independent" of the official show of authority.

Id. at 851 (JA 124) (internal citations omitted). Applying its three-part test, the majority first found the that Officer intended his show of authority to affect only the driver because the deputy directed his flashing lights "at the driver . . . and not the defendant." *Id.* (JA 125). The majority declared that, as a general matter "'[a]n officer causing a vehicle to pull over in transit is conducting an investigatory stop of the *driver*.'" *Id.* (JA 125) (alteration in original). The majority further offered that even if the Petitioner had been the *subject* of the deputy's show of authority, Petitioner, "as the passenger, had no ability to submit to the deputy's show of authority." *Id.* at 852 (JA 125).

The majority also held that Petitioner did not meet the second prong of its test because, notwithstanding being pulled over to the side of the road by a police officer, a reasonable person in Petitioner's position would have felt perfectly free to exit the car and walk away. See *id.* (JA 126). As for the third prong, the majority found that the incidental physical restraint – *i.e.*, the fact that "it is unsafe for the passenger to exit a moving vehicle" – is inapposite in the Fourth Amendment context. The majority likened this to what it described as the situation "in most cases," where passengers simply choose to stay in the car during traffic stops because they "prefer to await the completion of the traffic stop and continue en route in the company of the driver." *Id.* (JA 126).

In a vigorous dissent joined by two other justices, Justice Corrigan argued that "[p]assengers in a vehicle pulled over for a traffic stop are not free to leave, in either a practical or a constitutional sense." *Id.* at 855 (JA 133). Apart from obviously being "deprived of further freedom of movement," the dissent noted that once a vehicle has been pulled over, "based on the need to protect the officer's safety," under California and United States Supreme Court case law, "the officer has the authority, as a matter of law, to order that the passengers remain inside or get out of the vehicle." *Id.* (JA 133) (citing *Maryland* v. *Wilson*, 519 U.S. 408 (1997), and

People v. *Castellon*, 91 Cal. Rptr. 204 (Cal. Ct. App. 1999)). Thus, "[b]y stopping the vehicle, the officer has exerted authority over everyone in it." *Id.* at 857 (JA 136).

SUMMARY OF THE ARGUMENT

A traffic stop plainly interferes with the "freedom of movement" of *all* occupants in a vehicle and thereby deprives the passenger, as well as the driver, of recognized liberty, property and privacy rights. While this Court has not expressly held that a passenger is seized during a traffic stop, the Court has addressed the ability of police officers to control both drivers and passengers in the course of such actions. These precedents are squarely grounded in concerns for officer safety and hold, over strong dissents, that a passenger's liberty interests are constrained in these situations. When an officer is able to exert sufficient authority to order a passenger out of a car in the course of a traffic stop (or, by extension, to order someone who has gotten out of the car to get back in), it makes absolutely no sense to say for Fourth Amendment purposes that a passenger is not seized and therefore entirely free to either stay or leave. Plainly, such persons are detained for the balance of the time necessary to resolve the reason for the stop or until they are excused by the officer.

Indeed, an overwhelming majority of courts – both federal and state – that have considered this issue have held that a police officer who seizes a car by means of a traffic stop also seizes its passengers. The handful of state courts that have held otherwise have inappropriately focused in large part on the subjective intent of the officer in conducting the traffic stop, an element clearly rejected by this Court. Moreover, this Court has also dismissed the argument advanced by these state courts that a passenger, unlike the driver of a car that has been seized, would simply feel free to leave once the car has rolled to a stop.

The decisions from this Court relied upon by the California Supreme Court are factually distinguishable and their underlying principles do not apply to this case. First, none of the primary cases cited for support by the court below involve traffic stops. Second, the California Supreme Court attempts to analogize to cases involving the inapposite circumstance where the conduct on the part of the individual subject to the alleged seizure may be viewed as consensual. Unlike a situation where a police officer conducts a consensual search upon boarding an already stationary bus or approaching an individual in an airport lobby, a traffic stop unquestionably involves the wholly distinct action of effecting a forcible physical restraint of an individual's "freedom of action."

Finally, public policy and the purpose underlying the Fourth Amendment and its attendant exclusionary rule strongly suggest that the fruits of this admittedly unlawful traffic stop should be excluded. By permitting passengers to move to suppress the fruits of unreasonable traffic stops, this Court would both protect individual privacy interests against unlawful police intrusion and deter future unlawful police conduct. Furthermore, failing to allow such suppression would lead to anomalous results, such as permitting the admission of evidence against passengers but not drivers in the same vehicle under the identical circumstances.

ARGUMENT

I. THE UNREASONABLE STOP CONSTRAINED PETITIONER'S LIBERTY AND PRIVACY INTERESTS AND HE WAS THEREBY SEIZED FOR FOURTH AMENDMENT PURPOSES.

Although the practical question before this Court concerns Petitioner's entitlement to move to suppress the evidence seized as a result of the unlawful traffic stop, the more fundamental issue posed by this case concerns personal liberty and the freedom to move about without unreasonable interference by police. As this Court noted in *United States* v.

Brignoni-Ponce, "[W]henever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person, and the Fourth Amendment requires that the seizure be 'reasonable.'" 422 U.S. 873, 878 (1975) (quoting *Terry* v. *Ohio*, 392 U.S. 1, 16 (1968)). In turn, the reasonableness of such seizures depends on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers." *Id.* This Court has asserted that in drawing this balance, the Court must "assure that an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field." *Brown* v. *Texas*, 443 U.S. 47, 51 (1979). For "[t]he purpose of the Fourth Amendment is not to eliminate all contact between the police and the citizenry, but 'to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals.'" *United States* v. *Mendenhall*, 446 U.S. 544, 553-54 (1980) (quoting *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 554 (1976)).

The appropriate inquiry, then, is first whether the challenged search or detention has infringed an interest of the defendant's which the Fourth Amendment was designed to protect. In simple terms, the issue in this case is whether Petitioner, as a passenger in a moving car on a public roadway, had a Fourth Amendment interest in continuing on his journey without unreasonable police interference. Assuming this question is answered in the affirmative, the second question is whether, when the driver of the car in which Petitioner was traveling submitted to the police show of authority and brought the car to a halt, Petitioner was thereby detained.

The answer to each question is straightforward.

A. A Passenger's Fourth Amendment Rights Are Well Established.

A passenger traveling in a car on a public highway has a well-established liberty interest in continuing on that journey without unreasonable interference by law enforcement. The Court has repeatedly held that individuals have a liberty interest in their freedom of movement, *e.g.*, *Mendenhall*, 446 U.S. at 553-54, and "the right to personal security free from arbitrary interference by law officers." *Pennsylvania* v. *Mimms*, 434 U.S. 106, 109 (1977) (per curiam). As this Court observed in *Delaware* v. *Prouse*, the Fourth and Fourteenth Amendments afford both drivers and passengers the right to be free of even the briefest of unreasonable automobile stops. 440 U.S. 648, 653 (1979). Even though motorists travel on public roadways and are licensed as a state privilege, they nonetheless have the right to freedom from capricious and unreasonable stops in the process, and this Court has recognized that passengers enjoy similar rights. *Id.*

Specifically, the Court has acknowledged that traffic stops "interfere with freedom of movement, are inconvenient, and consume time," and may create anxiety in both drivers and passengers. *Id.* at 657. The Court has also noted that travel by automobile "is a basic, pervasive, and often necessary mode of transportation." *Id.* at 662. Accordingly, the Court has recognized the right of automobile passengers to be free of having "their travel and privacy interfered with at the unbridled discretion of police officers." *Id.* at 663.[6]

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[6] Concern about interference with an individual's "freedom of movement" has appeared in a variety of Fourth Amendment seizure contexts. For example, in *Brower* v. *County of Inyo*, this Court held that the successful use of a roadblock to stop the driver of a stolen vehicle constituted a seizure under the Fourth Amendment. 489 U.S. 593, 596 (1989). The suspect in *Brower* did not voluntarily stop his car in response to the police roadblock, but instead was killed when his vehicle crashed into the roadblock. *Id.* at 594. This Court rejected the argument that the ultimate restriction of Brower's freedom of movement was the result of

In short, the liberty and privacy interests that both motorists and passengers have are both well-established and well-recognized. Indeed, the Court has recognized that the liberty interest of passengers "is in one sense stronger than that for the driver" because of the driver's responsibilities to obey the law. *Maryland* v. *Wilson*, 519 U.S. 408, 413 (1997).

B. Passengers Are Seized Within The Meaning Of The Fourth Amendment When Authorities Stop The Car.

This Court has never directly confronted the second – and core – question of whether passengers are also seized during a traffic stop. The Court has, however, consistently held that a police detention of a moving vehicle generally results in a seizure of its occupants, no matter how brief the duration of the stop. For example, in *Whren* v. *United States*, 517 U.S. 806, 809-10 (1996), the Court stated that temporary detention of individuals during the stop of an automobile, even briefly and for a limited purpose, is a seizure under the Fourth Amendment. See also *United States* v. *Hensley*, 469 U.S. 221, 226 (1985) ("[S]topping a car and detaining its occupants constitute[s] a seizure within the meaning of the Fourth Amendment."). The Court reached a similar conclusion in *Berkemer* v. *McCarty*, noting that "a traffic stop significantly curtails the 'freedom of action' of the driver and the passengers, if any, of the detained vehicle." 468 U.S. 420, 436 (1984).

Although the particular question of whether a passenger is seized for Fourth Amendment purposes by virtue of a traffic stop is not one that this Court has confronted directly before now, the Court has on several occasions heard passenger challenges to the reasonableness of automobile stops. See,

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his independent decision to continue his flight, instead holding that a seizure occurs whenever "there is a governmental termination of freedom of movement through means intentionally applied." *Id.* at 597 (emphasis omitted).

e.g., *Whren*, 517 U.S. at 808-10; *Prouse*, 440 U.S. 648. Moreover, the Court has operated under the assumption that a passenger of an automobile subject to a traffic stop is "seized" for Fourth Amendment purposes to decide a number of cases addressing the scope of authority that officers have over passengers during traffic stops. In *Maryland* v. *Wilson*, this Court extended to passengers the ruling of *Pennsylvania* v. *Mimms*, in which the Court held that an officer conducting a lawful traffic stop could order a driver out of the car even where the officer had no particularized suspicion that the driver posed a threat to officer safety. *Wilson*, 519 U.S. at 413-14. The Court in *Mimms* described as "*de minimis*" this additional intrusion on the driver's liberty, since the driver was already lawfully detained due to the traffic stop itself. *Mimms*, 434 U.S. at 111.

The *Wilson* opinion also noted that "as a practical matter, the passengers are already stopped by virtue of the stop of the vehicle." 519 U.S. at 414. Thus, just as in *Mimms*, the order that a passenger spend his or her temporary detention outside rather than inside the vehicle is at best a *de minimis additional* intrusion on the passenger's liberty. The majority opinion in *Wilson* necessarily acknowledged that a passenger is detained as soon as the driver submits to the officer's show of authority by stopping the vehicle. If the passenger were not detained at all, it is difficult to imagine how, in the absence of any particularized suspicion, an order that a passenger exit a vehicle or get back in it if he did exit could be constitutionally justified. Cf. *Michigan* v. *Summers*, 452 U.S. 692, 695, 703 (1981) (in executing a warrant to search a house for narcotics, police could order someone leaving the house to go back inside, because such a detention constitutes "only an incremental intrusion on personal liberty").

The presumption that a passenger remains detained when the car comes to a halt was fundamental to the *Wilson* holding, and found considerable support in this Court's decision in *Delaware* v. *Prouse*. In that case, the defendant

was a passenger in a vehicle that was pulled over at random by a police officer. The officer had "observed neither traffic or equipment violations nor any suspicious activity, and [he admitted] that he made the stop only [] to check the driver's license and registration." *Prouse*, 440 U.S. at 650. Upon approaching the vehicle, the officer smelled marijuana smoke and subsequently saw contraband in plain view on the car's floor.

The Court held that the Fourth and Fourteenth Amendments were implicated in this instance, "because stopping an automobile and detaining its occupants constitute a 'seizure' within the meaning of those Amendments, even though the purpose of the stop is limited and the resulting detention quite brief." *Id.* at 653. Here, the California Supreme Court attempted to sidestep the import of this language in *Prouse* by making the inapposite assertion that the Delaware Supreme Court's opinion erroneously identified the defendant as the "operator" of the vehicle. See *Brendlin*, 136 P.3d at 850 (JA 122). This was of no moment, however, as this Court specifically corrected the Delaware Supreme Court's mistake, and still found constitutional violations even though the defendant-respondent merely "occupied" the vehicle, and was likely even in the back seat at the time it was pulled over. See *Prouse*, 440 U.S. at 650 n.1.

Indeed, throughout the Court's analysis in *Prouse*, it observed that Fourth and Fourteenth Amendment protections cover drivers and passengers alike. For example, the Court noted that "[a]n individual operating *or traveling* in an automobile does not lose all reasonable expectation of privacy simply because the automobile and its use are subject to government regulation." *Id.* at 662 (emphasis added). In addition, it asserted that "the security guaranteed by the Fourth Amendment would be seriously circumscribed" were individuals "subject to unfettered governmental intrusion every time [they] entered a vehicle." *Id.* at 662-63.

C. The Vast Majority Of The Courts To Have Considered These Questions Have Found That A Traffic Stop Constitutes A Seizure Of All Occupants Of The Seized Vehicle.

A holding that a passenger is seized by a traffic stop would be far from revolutionary; to the contrary, it represents the nearly unanimous view of both state and federal courts. Every one of the federal circuit courts of appeals to have considered the issue has found that a passenger may challenge a traffic stop under circumstances similar to those in this case. See, *e.g.*, *United States* v. *Mosley*, 454 F.3d 249 (3d Cir. 2006); *United States* v. *Grant*, 349 F.3d 192 (5th Cir. 2003); *United States* v. *Ameling*, 328 F.3d 443 (8th Cir. 2003); *United States* v. *Twilley*, 222 F.3d 1092, 1095 (9th Cir. 2000); *United States* v. *Gama-Bastidas*, 142 F.3d 1233 (10th Cir. 1998); *United States* v. *Sowers*, 136 F.3d 24 (1st Cir. 1998); *United States* v. *Brown*, 102 F.3d 1390 (5th Cir. 1996), *overruled on other grounds*, 161 F.3d 256 (5th Cir. 1998); *United States* v. *Eylicio-Montoya*, 70 F.3d 1158, 1164 (10th Cir. 1995); *United States* v. *Kimball*, 25 F.3d 1, 5 (1st Cir. 1994); *United States* v. *Roberson*, 6 F.3d 1088, 1091 (5th Cir. 1993); *United States* v. *Rusher*, 966 F.2d 868 (4th Cir. 1992); *United States* v. *Powell*, 929 F.2d 1190, 1195 (7th Cir. 1991); *United States* v. *Erwin*, 875 F.2d 268, 270-71 (10th Cir. 1989); *United States* v. *Durant*, 730 F.2d 1180 (8th Cir. 1984); *United States* v. *Williams*, 589 F.2d 210, 214 (5th Cir. 1979); see also *United States* v. *Hill*, 855 F.2d 664, 666 (10th Cir. 1988) (passenger on boat boarded by police without warrant "clearly may challenge the validity of his own arrest . . . . [and] may therefore claim that evidence found as a fruit of the arrest should be excluded").

The vast majority of states to pass on the issue have likewise held that passengers are seized in a traffic stop and may challenge both the legality of the stop and the admissibility of evidence obtained therefrom. See, *e.g.*, *People* v. *Bunch*, 764 N.E.2d 1189, 1193 (Ill. App. Ct. 2002);

State v. *Gomez*, 6 P.3d 765, 766 (Ariz. Ct. App. 2000); *State* v. *Bowers*, 976 S.W.2d 379, 381 (Ark. 1998); *State* v. *Harris*, 557 N.W.2d 245 (Wis. 1996); *State* v. *Carter*, 630 N.E.2d 355, 360-61 (Ohio 1994); *State* v. *Wilson*, 867 P.2d 1175, 1179 (N.M. 1994); *State* v. *Higgins*, 884 P.2d 1242, 1244 (Utah 1994); *Howard* v. *State*, 888 S.W.2d 166, 172 (Tex. Crim. App. 1994); *State* v. *Stott*, 503 N.W.2d 822, 828 (Neb. 1993), *overruled on other grounds*, *State* v. *Johnson*, 589 N.W.2d 108 (Neb. 1999); *State* v. *Krebs*, 504 N.W.2d 580 (S.D. 1993); *McKnight* v. *State*, 612 N.E.2d 586, 588 (Ind. Ct. App. 1993); *Ott* v. *State*, 600 A.2d 111 (Md. 1992); *State* v. *Creech*, 806 P.2d 1080, 1082 (N.M. Ct. App. 1991); *State* v. *Harms*, 449 N.W.2d 1, 4 (Neb. 1989); *State* v. *Epperson*, 703 P.2d 761, 770-71 (Kan. 1985); *State* v. *Haworth*, 679 P.2d 1123, 1123-24 (Idaho 1984); *State* v. *Eis*, 348 N.W.2d 224, 226 (Iowa 1984); *People* v. *Lagrone*, 464 N.E.2d 712, 714 (Ill. App. Ct. 1984); *People* v. *Kunath*, 425 N.E.2d 486, 489-90 (Ill. App. Ct. 1981); *State* v. *DeMasi*, 419 A.2d 285, 294-95 (R.I. 1980), *vacated on other grounds*, 452 U.S. 934 (1981). By far the prevailing view in the United States, then, is that a passenger is seized by virtue of a traffic stop, and in the event that such a stop is unreasonable, the passenger may move to suppress the fruits of that seizure.

Prominent commentators also support Petitioner's position. "If either the stopping of the car [or] the length of the passenger's detention thereafter . . . are unreasonable from a Fourth Amendment sense, then surely the passenger has standing to object to those constitutional violations and to have suppressed any evidence found in the car." W.R. LaFave, *Search and Seizure* § 11.3 (4th ed. 2004); William E. Ringel, *Searches and Seizures, Arrests and Confessions* § 11:20 (Mar. 2007) (Passengers "are not foreclosed from challenging the stop of the vehicle, since such a stop encompasses a personal seizure . . . [in *Rakas*,] the Court ruled only on right to contest the search. If the stop had been challenged and found illegal, the subsequent search and any

evidence uncovered through it would have been tainted and suppressed as illegal fruit."). "A passenger has standing to challenge the stop, as opposed to the search, of the vehicle in which he or she is riding." Paul Coltoff et al., 79 C.J.S. *Searches* § 103 (Feb. 2007). "Even absent ownership or possession of the vehicle, a passenger has standing to challenge a stop, seizure, or arrest to the extent it violates his own Fourth Amendment rights." 1 Crim. Prac. Manual § 23:10 (Feb. 2007). See also Erica Flores, *"People, Not Places": The Fiction of Consent, The Force of the Public Interest, and the Fallacy of Objectivity in Police Encounters with Passengers During Traffic Stops*, 7 U. Pa. J. Const. L. 1071, 1079 (2005) ("[P]assengers are subjected to a seizure as soon as the car is pulled over. Whether that seizure may be described as incidental is irrelevant. Passengers are forced to yield to police authority when the driver does.").

The California Supreme Court acknowledged that only two other Courts have taken the position that a passenger in a car subject to a traffic stop is not seized under the Fourth Amendment. *Brendlin*, 136 P.3d at 849 (JA 120) (citing *People* v. *Jackson*, 39 P.3d 1174 (Colo. 2002) and *State* v. *Mendez*, 970 P.2d 722 (Wash. 1999)); see also *Jarvis* v. *State*, 600 A.2d 38, 41 n.1 (Del. Super. Ct.) (passenger has no "standing" to challenge stop of vehicle but may challenge subsequent detention of her person), *aff'd sub nom. Mitchell* v. *State*, 604 A.2d 418 (Del. 1991).

The Colorado Supreme Court concluded in *Jackson* that a passenger is not detained by a traffic stop because "a traffic stop is an investigatory stop of the driver; the display of authority and control is directed at the driver, not the passenger." *Jackson*, 39 P.3d at 1185. The Washington Supreme Court employed similar reasoning in *Mendez*, where the court asserted that "the privacy rights of passengers . . . are not diminished by the [automobile] stop" because there is only "probable cause to believe that the driver has committed" the offense targeted by the police. *Mendez*, 970

P.2d at 729. In addition, both courts found – *Jackson* explicitly and *Mendez* implicitly – that because the show of authority during a traffic stop is directed at the driver, a reasonable passenger would feel free to leave or to terminate the encounter. *Jackson*, 39 P.3d at 1186; *Mendez*, 970 P.2d at 729.

Like the California Supreme Court below, see *Brendlin*, 136 P.3d at 851 (JA 125), both the Colorado and Washington Courts incorrectly focus on the officer's subjective intent in the analysis of whether a passenger has been detained. The question of whether the driver or the passenger is the focus of the officer's investigation is of no importance to the issue of whether the passenger is detained, as this Court expressly rejected such a requirement when it rejected the "target of the investigation" approach in *Rakas* v. *Illinois*, 439 U.S. 128, 132-34. Moreover, this Court has consistently held that "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." *Whren*, 517 U.S. at 813.

In fact, as Petitioner's *Amici* observe, authorities can and do stop vehicles for passenger behavior and passengers may be separately cited. NACDL & NAFD Br. at 15 & n.9. This Court has also previously noted that the convenient parsing of an officer's intention necessarily injects an inappropriately subjective component into that court's test for what constitutes a seizure. See *Whren*, 517 U.S. at 813. But even if none of this were enough, the California Supreme Court ignored the Court's express language in *Brower* v. *County of Inyo* that "[a] seizure occurs even when an unintended person or thing is the object of the detention or taking" so long as the officer's actions in effecting the detention or taking itself were wilful. 489 U.S. 593, 596 (1989) (internal citations omitted). An officer conducting a traffic stop must reasonably and, as a matter of caution, expect that passengers could be present and will be necessarily detained by the stop, whether or not those passengers are the subject of the police investigation.

Thus, there can be no question that Petitioner was detained by the traffic stop even if the officer's suspicions were focused on the driver. The officer intended to seize the vehicle and its occupants, he took steps to effect that seizure by activating his overhead lights, and the driver did in fact submit to the officer's show of authority. Through "means intentionally applied," the officer halted Petitioner's freedom of movement.

The state courts' further suggestion that a passenger subject to a traffic stop would "feel free to leave" is also without merit. This Court has unequivocally asserted that "few motorists" (*i.e.*, "the driver and the passengers") "would feel free . . . to leave the scene of a traffic stop without being told they might do so." *Berkemer*, 468 U.S. at 436. Furthermore, given this Court's holding in *Wilson* that an officer may order a passenger out of the car during a traffic stop as a matter of course, *with no additional suspicion of wrongdoing*, this conclusion regarding what a reasonable passenger would believe appears to be untenable at best. See *Wilson*, 519 U.S. at 410.

It appears that the misstep made by the California, Colorado, and Washington Supreme Courts stems from their confusion over the appropriate analytical framework to apply. The Fourth Amendment limits the government's power to control "persons, houses, papers, and effects." U.S. Const. amend. IV; see *Hensley*, 469 U.S. at 226. A Fourth Amendment seizure occurs when a person, house, paper or effect is controlled by government action. This Court has identified two different tests for what constitutes a "seizure." When the government seeks to control "houses, papers, and effects," the Court ordinarily applies the test that a seizure occurs "when there is some meaningful interference with an individual's possessory interests." *United States* v. *Jacobsen*, 466 U.S. 109, 113 (1984). When the government seeks to control persons, the Court determines that a seizure has occurred when a law enforcement agent, "by means of

physical force or show of authority, has in some way restrained the liberty of a citizen." *Terry* v. *Ohio*, 392 U.S. 1, 19 n.16 (1968).

These two tests reflect the different ways that police ordinarily control persons as compared how police ordinarily control houses, papers, and effects. When officers enter a suspect's home and take away his papers, those papers are taken by direct force. Officers pick up the papers and remove them, and the government's control interferes directly with the individual's possessory interest. *Jacobsen*, 466 U.S. at 113-14. In contrast, government control over a person is often less direct. In some cases, the police may exert direct physical control over the person, such as by placing him in handcuffs. In many cases, however, the police exert control by threat. If an officer points a gun at a suspect and orders him to "freeze!," the person is seized when he complies with the officer's order. See *California* v. *Hodari D.*, 499 U.S. 621, 626 (1991). The moment that a reasonable person would not feel free to leave and does not leave is the moment that the officer controls the person. In sum, both tests for when a seizure occurs pinpoint the same moment in two different contexts. In both contexts, a seizure occurs when the government takes control of the person, house, paper, or effect.

Whether a traffic stop seizes a passenger has divided these state courts because it involves control over a person in a context more typical of control of paper and effects. When an officer pulls over a car, he directs his authority at the driver because the driver has initial control of the vehicle. The passenger is simply along for the ride. This creates confusion under the usual test for seizing a person – whether a reasonable person would feel free to leave – because the officer is causing a seizure by threat not actually directed at the passenger. However, the uncertainty is readily resolved by recognizing the purpose of both tests for seizures: both tests identify the moment of control. A passenger in a seized

car is controlled just like the contents of a seized package; when government action takes control of "effects," it seizes those effects as well as any person who happens to be located inside. When an officer pulls over a vehicle, he does not simply control the driver: he controls the entire vehicle and all of its contents. All are seized under the Fourth Amendment.

The California Supreme Court also mistakenly concluded that Brendlin was not seized because he was merely acted upon by the driver of the vehicle. *Brendlin*, 136 P.3d at 851 (JA 124-125). Under this theory, the officer acted on the driver, and the driver separately acted on Brendlin. This artificial bifurcation is based on a misunderstanding of the line between state actors and private actors under the Fourth Amendment. When a private party acts as an instrument or agent of the govern-ment, that private party becomes a state actor for Fourth Amendment purposes. *Skinner* v. *Ry. Labor Executives' Ass'n*, 489 U.S. 602, 614-15 (1989). The Fourth Amendment clearly applies when the government commandeers a private actor and orders that actor to commit a search or seizure. For example, if an officer orders a UPS driver to pull over so he can inspect a package in the driver's UPS truck, the contents of the package are seized when the driver complies. *United States* v. *Souza*, 223 F.3d 1197, 1201-02 (10th Cir. 2000). The officer's command has transformed the UPS driver into a state actor for Fourth Amendment purposes, and the govern-ment's interruption of the steam of delivery constitutes a seizure. *Id.*; see also *Corngold* v. *United States*, 367 F.2d 1, 13 (9th Cir. 1966). The same principle applies when a police officer orders a driver to pull over in a routine traffic stop. The officer has commandeered the driver, and thus the driver's conduct may be attributed to the government. Just like the package in the UPS truck, the passenger in the vehicle is seized.

II. THE CASE LAW FROM THIS COURT RELIED UPON BY THE CALIFORNIA SUPREME COURT IS IN APPOSITE.

In concluding that a passenger subjected to a traffic stop is not seized for purposes of the Fourth Amendment, the California Supreme Court dismissed the overwhelming weight of authority and this Court's strong indications to the contrary. Instead, it extrapolated from this Court's holdings in *California* v. *Hodari D.*, 499 U.S. 621 (1991), and *Florida* v. *Bostick*, 501 U.S. 429, 431 (1991), a rigid checklist of conditions that must be met before a seizure can be deemed to have occurred. *Brendlin*, 136 P.3d at 851 (JA 124). The test that emerges from the California court's review of this Court's precedents focuses on factors that are simply not applicable to a traffic stop or consistent with this Court's general aversion to subjective intent tests in the Fourth Amendment context.

In *Hodari D.*, this Court held that a seizure requires *either* submission to a show of authority *or* physical restraint by police. *Hodari D.*, 499 U.S. at 626. A traffic stop of a car containing multiple occupants satisfies both conditions. When the police stop a car or truck, the passenger is subject to both the authority the police are asserting and the physical restraint resulting from that assertion of authority. When the driver of a moving vehicle submits to police authority and brings that vehicle to a stop, the car and its occupants are thereby legally seized. Cf. *Prouse*, 440 U.S. at 653.

Although the question of what constitutes a seizure for purposes of the Fourth Amendment can lead to a detailed factual analysis of the totality of the circumstances (see, *e.g.*, *Bostick*, 501 U.S. at 431), this case involves intentional and successful police interference with Petitioner's freedom of movement, and is not a close case in which the contact between Petitioner and the deputy could arguably have been deemed consensual. At the moment that a driver submits to an officer's show of authority and stops his car, the passenger

has no more ability to terminate the encounter and go about his business than does a fleeing motorist who runs into a police barricade. Cf. *Brower*, 489 U.S. at 597. The seizure is complete when the person's freedom of movement has been curtailed. *Terry*, 392 U.S. at 16.

Under starkly different circumstances, this Court has held that the test to determine whether a police contact is consensual in nature depends on whether, in view of the totality of the circumstances, a reasonable person would have believed himself free to disregard the police and go about his business, leave the scene, or otherwise terminate the encounter. *Bostick*, 501 U.S. at 434; *Mendenhall*, 446 U.S. at 554. To date, that test has been applied only in situations in which police action did not interfere with the individual's freedom of movement. When an officer approaches an individual on the street or even in a more controlled environment such as an airport, simple questioning will not transform the encounter into a seizure unless the circumstances are such that a reasonable person would not feel free to walk away. *Mendenhall*, 446 U.S. at 555. Only where police action actively impedes the person's ability to terminate the police contact and go about his business will the encounter be deemed a seizure under the Fourth Amendment. See *Florida* v. *Royer*, 460 U.S. 491 (1983). Likewise, when police approach a person on a bus making a scheduled stop, the person is not detained simply because police question him and ask for consent to search his belongings; the encounter will not constitute a detention unless the conduct of the officers would lead a reasonable person to believe that he is not free to terminate the encounter. *Bostick*, 501 U.S. at 434; *United States* v. *Drayton*, 536 U.S. 194 (2002).

In *Bostick*, this Court addressed the distinction between officer conduct that interferes with freedom of movement, and conduct that is merely coercive without actively impeding a suspect's freedom to walk away from the encounter:

> When police attempt to question a person who is walking down the street or through an airport lobby, it makes sense to inquire whether a reasonable person would feel free to continue walking. But when the person is seated on a bus and has no desire to leave, the degree to which a reasonable person would feel that he or she could leave is not an accurate measure of the coercive effect of the encounter.

Bostick, 501 U.S. at 435-36. The Court went on to point out that Bostick, as a passenger seated on a bus that was scheduled to depart, had no plans to leave the bus regardless of the officers' presence: "Bostick's movements were 'confined' in a sense, but this was the natural result of his decision to take the bus; it says nothing about whether or not the police conduct at issue was coercive." *Id.* at 436.

Here, the California Supreme Court relied on this language from *Bostick* for the proposition that the interference with the individual's liberty interests must not be the result of some force independent of police conduct, specifically the passenger's decision to ride in an automobile. *Brendlin*, 136 P.3d at 852 (JA 126). *Bostick*, however, did not present a situation in which the individual's "freedom of action" had been curtailed in the first place. The passenger in *Bostick* was not on a bus that the officer had pulled over. Instead, his journey had not yet begun and he was sitting on a bus that was scheduled to leave the station; the officer's actions in that case did not impede the passenger's movement in any way because there had not yet been any such movement. *Bostick*, 501 U.S. at 435-36. By contrast, Petitioner's liberty interest in continuing his planned journey was impeded from the moment the car came to a stop. Unlike the passengers in *Bostick* and *Drayton*, Petitioner does not challenge his confinement in a vehicle that was not in motion. And unlike the officers in *Bostick* and *Drayton* who were lawfully on the bus to question passengers, the stop made by the Deputy here was unreasonable and undertaken with no lawful basis upon

which to question the driver and Petitioner in the first instance. Thus, Petitioner challenges the officer's actions on the ground that the encounter should never have happened, and his argument concerns neither the impracticalities of his leaving nor the supposed consensual nature of the interaction or the practical occurrence that was entirely dependent upon the driver's submission to coercive police conduct.

Bostick, *Mendenhall*, *Royer*, and *Drayton* all involve a similar type of interaction between police and citizens: in each case, the police action is limited to questioning without more coercive conduct. The distinction between the *Bostick* and *Mendenhall* line of cases and the instant case is that in the former scenario, police have not intentionally impeded the person's freedom of movement. In other words, the inquiry addresses whether an otherwise consensual encounter that does not interfere with a suspect's movement or freedom of action is accompanied by police conduct so coercive as to transform the event into a seizure. See *Drayton*, 536 U.S. at 204. By contrast, where an officer, either by force or by a successful assertion of authority, has deliberately impeded an individual's freedom of movement, this Court has consistently held that the individual has been detained for purposes of the Fourth Amendment. See *Brower*, 489 U.S. at 597.

III. A PASSENGER'S DETENTION LOGICALLY ENDS WHEN THE AUTHORITY RESPONSIBLE FOR THE STOP GIVES PERMISSION OR WHEN THE STOP ITSELF CONCLUDES.

Although the inquiry undertaken by *Bostick* and *Mendenhall* regarding whether a reasonable person would feel free to terminate the encounter and go about his business is inapposite to the question of whether a passenger is detained by the initial stop of a car in response to an officer's lights and sirens, it is relevant to the related question of when such a detention comes to an end. The California Supreme Court concluded that a passenger is free to leave once the

vehicle comes to a stop, absent particularized suspicion permitting the officer to order the passenger to remain in the car. *Brendlin*, 136 P.3d at 853-54 (JA 127-130). This Court's holdings, however, do not support such a conclusion.

This Court's decisions, particularly the decision in *Maryland* v. *Wilson*, have consistently demonstrated that a passenger's Fourth Amendment interests are implicated from the inception of a traffic stop, and that the limitations on the passenger's liberty continue for the duration of the stop, or at least until the officer indicates that the passenger is free to go. As already discussed, the Court in *Wilson* balanced the "de minimis" intrusion of ordering a passenger out of the vehicle during a traffic stop against the overriding concern for officer safety. The Court concluded that under the circumstances, the order constituted only a minimal change in circumstances because the passenger had already been stopped, and thus such an order only altered the location in which the passenger would await the completion of the stop. *Wilson*, 519 U.S. at 414.

In *Wyoming* v. *Houghton*, 526 U.S. 295 (1999), this Court held that a police officer with probable cause to conduct a warrantless search of the interior of a car could also search the personal belongings of a passenger if those belongings are capable of concealing contraband. The Court's holding appeared to rest on the notion that the car and its contents, including passengers and their belongings, were seized during the stop and subsequent investigation and search: "A passenger's personal belongings, just like the driver's belongings or containers attached to the car like a glove compartment, are 'in' the car, and the officer has probable cause to search for contraband in the car." *Id.* at 302. And in *Maryland* v. *Pringle*, 540 U.S. 366 (2003), a unanimous Court extended the holding in *Wyoming* v. *Houghton* to permit the warrantless arrest of a passenger for possession of items found in a car during a routine traffic stop, where the passengers and the driver denied possession of the

contraband. In finding that the officer could reasonably infer that all three men were jointly engaged in criminal activity simply because all three occupied the same car that contained the contraband, the Court relied on the *Houghton* Court's observation that an auto passenger "will often be engaged in a common enterprise with the driver, and have the same interest in concealing the fruits or the evidence of their wrongdoing." *Pringle*, 540 U.S. at 373 (quoting *Houghton*, 526 U.S. at 304-05).

This exposure on the part of passengers would suggest strongly that the law does not treat passengers as appreciably different than drivers when a stop is affected. *Wilson*, *Houghton*, and *Pringle* thus underscore the limitations on a passenger's liberty that begin when the officer makes the traffic stop and continue until the investigation has concluded, or until the officer makes it clear that the passenger is free to go.

IV. THE UNREASONABLENESS OF THE STOP HERE WARRANTS SUPPRESSION OF THE EVIDENCE AGAINST PETITIONER.

Finally, public policy and the purposes of both the Fourth Amendment and its attendant exclusionary rule counsel in favor of excluding the evidence in this case. Permitting a passenger to move to suppress the fruits of an unreasonable traffic stop furthers the aims of the Fourth Amendment – to protect privacy interests against unlawful police intrusion – and is consistent with the purpose of the exclusionary rule – to deter future unlawful police conduct. *Illinois* v. *Krull*, 480 U.S. 340, 347 (1987); *United States* v. *Calandra*, 414 U.S. 338, 347 (1974).

"[T]he Fourth Amendment addresses 'misuse of power,' not the accidental effects of otherwise lawful government conduct." *Brower*, 489 U.S. at 596 (internal citation omitted). Petitioner seeks to suppress evidence that was obtained through deliberate police action which, as the State concedes,

constituted "misuse of power." This is entirely consistent with the purpose of the Fourth Amendment's Search and Seizure Clause, which was specifically designed to restrain government intrusions against individuals. *Weeks* v. *United States*, 232 U.S. 383, 391-92 (1914) ("The effect of the Fourth Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers and effects against all unreasonable searches and seizures under the guise of law."), *overruled on other grounds by Mapp* v. *Ohio*, 367 U.S. 643 (1961). It is long established by this Court that the purpose of the Search and Seizure Clause requires that evidence obtained in violation of the Clause be suppressed. This is because "a ruling admitting evidence in a criminal trial . . . has the necessary effect of legitimizing the conduct which produced the evidence, while an application of the exclusionary rule withholds the constitutional imprimatur." *Terry*, 392 U.S. at 13.

The exclusionary rule therefore is "designed to safeguard against future violations of Fourth Amendment rights through the rule's general deterrent effect." *Arizona* v. *Evans*, 514 U.S. 1, 10 (1995); see also *United States* v. *Leon*, 468 U.S. 897, 906 (1984). Since its announcement forty years ago in *Mapp* v. *Ohio*, 367 U.S 643 (1961), that the rule was binding on the states as part of the Fourteenth Amendment's due process guarantee, this Court has looked closely at the rule's "deterrent effect" in various contexts in determining how broadly the rule should be applied. See *Leon*, 468 U.S. at 906-13. The Court has concluded that unlawfully seized evidence should be excluded only when that exclusion is likely to have a significant effect in deterring the police from acting in a manner which they know or reasonably believe to be unlawful. *Pa. Bd. of Prob. & Parole* v. *Scott*, 524 U.S 357, 362-63 (1998). Specifically, the rule applies when it will

"alter the behavior of individual law enforcement officers or the policies of their departments." *Leon*, 468 U.S. at 918.

This Court has accordingly declined to apply the exclusionary rule where police conduct was "objectively reasonable." *Id.* at 922. The Court has also declined to apply the rule where the causal link between the constitutional violation and the discovery of the evidence is attenuated, or where "the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained." *Hudson* v. *Michigan*, 126 S. Ct. 2159, 2164 (2006). The Court has thus declined to apply the exclusionary rule on a strictly "but-for" basis, meaning that evidence will not be suppressed simply because unlawful police action led directly to its discovery. Instead, suppression is appropriate where the evidence has been discovered due to police exploitation of the illegal search or seizure. *Id.* (citing *Wong Sun* v. *United States*, 371 U.S. 471, 478-88 (1963)).

Suppression is appropriate in this case because the officer exploited an unlawful detention to conduct further investigation that ultimately led to the seizure of evidence that would otherwise have gone undiscovered. The prosecution pointed to no intervening factors between the illegal police activity and the discovery of the evidence to be suppressed that could have purged the taint of the unreasonable traffic stop. The identification of Petitioner, the discovery of his parole status, and his subsequent arrest and search were all the immediate and direct result of the illegal traffic stop. No intervening factors purged the taint of the initial stop, and the arrest and search would not have occurred absent the illegal stop. In using an unreasonable traffic stop as a stepping stone to a warrant check and subsequent arrest and search, the officer exploited the initial illegality in precisely the manner condemned by this Court in *Wong Sun* and *Hudson*.

Unlike the scenario in *Hudson*, where the defendant sought to suppress evidence seized pursuant to a lawful warrant that

was executed in an unlawful manner, this case presents a situation in which the deterrence benefits of suppression outweigh the "substantial social costs." Cf. *Hudson*, 126 S. Ct. at 2165. In *Hudson*, those costs included the possibility that evidence obtained pursuant to a valid search warrant, supported by probable cause and issued by a magistrate in compliance with the Fourth Amendment, would nonetheless be subject to suppression. *Id.* at 2166. Against that concern, the Court weighed the "value of deterrence" under the particular circumstances. The Court concluded that the incentive for police to violate the knock-and-announce rule was not high, given that such violations are unlikely to result in discovery of any evidence that could not otherwise be discovered through lawful means, and that the knock-and-announce rule exists, in part, for the protection of law enforcement officers. *Id.*

The competing interests in this case balance out differently. The only factor counseling against suppression is the concern that application of the exclusionary rule will mean that some crimes will go unpunished, but this interest is the same whether it is a passenger or a driver seeking suppression of evidence. On the other side of the equation, the factors supporting suppression are overwhelming. As has already been discussed at length *supra*, the passenger's liberty interest in not having his journey interrupted by unreasonable police conduct is the same as, if not stronger than, the driver's liberty interests. *Wilson*, 519 U.S. at 412-13.

Moreover, this case is distinguishable from *Hudson* in that the interest in protecting police here weighs in favor of suppression. As previously noted, the Court in *Hudson* found that because violations of the knock-and-announce rule posed a danger to police, the police have sufficient incentive to avoid such violations without the need to apply the exclusionary rule. *Hudson*, 126 S. Ct. at 2166. Here, as demonstrated by the California Supreme Court opinion below, the Court can only avoid application of the

exclusionary rule by adopting the legal fiction that a passenger is not detained during or immediately following a traffic stop. This fiction leads inexorably to the conclusion that, absent particularized suspicion that the passenger is involved in criminal activity, a passenger is free to exit the vehicle and leave the scene as soon as the car comes to a stop. *Brendlin*, 136 P.3d at 855 (JA 131-132).

However, as this Court observed in *Maryland* v. *Wilson*, the "danger to an officer from a traffic stop is likely to be greater when there are passengers in addition to the driver in the stopped car." 519 U.S. at 414. The California opinion interprets *Wilson* to impose no burden upon a passenger amounting to a seizure unless the officer has ordered the passenger out of the vehicle, and deprives officers of the ability to order a passenger to remain in the car without particularized suspicion that the passenger poses a danger. *Brendlin*, 136 P.3d at 855-56 (JA 133-135). Thus the interest in protecting officer safety is best protected by avoiding the legal fiction adopted by California, affirming the long-standing presumption that a passenger is detained when an officer makes a traffic stop, and permitting a passenger to challenge the fruits of a traffic stop that is illegal at its inception.

Finally, if evidence seized as a result of an unlawful stop may be used against any passenger in the vehicle, even where the driver has successfully moved to suppress that evidence, the driver's protection against unlawful seizures has been diminished. Police would have little incentive to avoid making unreasonable traffic stops of any car containing multiple occupants, and in fact would be encouraged to engage in facially invalid traffic stops with increased odds that any evidence seized could be used against at least one occupant of the vehicle. The constitutional harm suffered by the occupants of a moving vehicle that is stopped without justification is not the indignity of a possible criminal prosecution resulting from the fruits of that justification, but

rather the invasion of privacy that results from the stop itself. As this Court has noted, the Fourth Amendment violation is "fully accomplished" by the illegal seizure, and the suppression of evidence does not cure that harm, but only serves to deter police from further unlawful activities. *Scott*, 524 U.S. at 362-63. If the evil to be avoided is not prosecution for a crime, but unreasonable invasion of a protected privacy interest, then the California rule diminishes protection against that evil.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the Supreme Court of California and vacate the sentence.

Respectfully submitted,

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